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In the Supreme Court
OF THE
United States

October Term, 1964

No. 581

Harry P. Locklin and Elmer J. Brant, general partners doing business under the firm name of Radiant Color Company,

Petitioners,

vs.

Switzer Brothers, Inc., Robert C. Switzer and Joseph L. Switzer,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Carl Hoppe,
2510 Russ Building
San Francisco 4, California
Attorney for Petitioners.

William J. Marshall, Jr.,
135 South LaSalle Street
Chicago 3, Illinois
Of Counsel for Petitioners.

PERKAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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1. Four times, Switzer advises this Court that the supplemental counterclaim and the original complaint are "unverified" (pp. 1, 2 and 8). This is true, but it is not germane. Rule 11, Federal Rules of Civil Procedure, states ". . . Except when otherwise specifically provided by rule or statute, pleadings need not be verified or ac-

companied by affidavit. . . ." There is no rule or statute which requires that an antitrust pleading or that the pleading in an independent action under Rule 60(b) must be verified. If the case were to turn on such a procedural technicality, then, in the interest of justice, this cause should be remanded for the purpose of enabling the pleadings to be verified.

2. Five times, Switzer informs this Court that the pleadings below are "unsupported" (pp. 1, 2 and 8). Rule 11, referred to above, precludes the view that a cause of action must be supported at the pleading stage. The reason is that, in the pleadings stage, all of the substantial averments of a pleading are regarded as being true without further support. This is as true in an independent action for relief from a judgment [*Arrowsmith v. Gleason* (1889), 129 U.S. 86, 97; and *Marshall v. Holmes* (1891), 141 U.S. 589, 596], as it is in an antitrust case [*United States v. Shubert* (1955), 348 U.S. 222, 225; and *Radiant Burners v. Peoples Gas Co.* (1961), 364 U.S. 656].

The present pleadings, Radiant submits should be liberally construed in accordance with the spirit of *Conley v. Gibson* (1957), 355 U.S. 41 and *Foman v. Davis* (1962), 371 U.S. 178.

3. Switzer charges that Radiant seeks to "retry" and "relitigate" fraud issues which have already been "determined" (pp. 1 and 2). This begs the question. All three questions posed by Radiant involve the implicit subissue as to whether the motion proceedings determined in the discretion of the Court on conflicting affidavits are the same as a trial. Radiant contends that there has been no trial, no final determination and no res judicata. Swit-

zer contends that there has been a trial and that therefore the new pleadings seek a retrial. The basic unsoundness of Switzer's premise is illustrated in *Hazel-Atlas Co. v. Hartford Co.* (1944), 322 U.S. 238. At page 249, footnote 5, this Court noted:

> "We do not hold, and would not hold, that the material questions of fact raised by the charges of fraud against Hartford could, if in dispute, be finally determined on ex parte affidavits without examination and cross-examination of witnesses. . . ."

Indeed, one of the practical advantages which the independent action has over the motion procedure is that the independent action affords the litigant the use of the discovery rules and the safeguards of cross-examination in open court whereas the motion procedure depends upon ex parte affidavits which may be destroyed by ex parte counter-affidavits [*Truett v. Wainwright, et al.*, (1847), 4 Gilman (Ill.), 418, 420; and *Estudillo v. Security Loan Etc. Co.* (1906), 149 Cal. 556, 564].

4. Switzer argues, footnote, page 8, that "Radiant did not even controvert that affidavit (of Joseph L. Switzer) when presented to the California District Court." Pages 216 and 217 of the appendix before the Court of Appeals for the Seventh Circuit in Nos. 14,383-14,384, nine copies of which are submitted to this Court, disclose that Radiant objected to "these affidavits being accepted as proof of the facts although they are proper to show that there might be a disputable issue."

5. Switzer's argument, pages 10-14, arranging quotations from the petition and from the opinion of the Court of Appeals in pairs, does not, Radiant submits, warrant

a denial of the petition but serves instead to demonstrate that the petition should be granted. Switzer's presentation effectively points up several areas in which Radiant contends that the Court of Appeals committed clear error. Switzer's argument really proves that the petition is truly geared to the opinion of the Court of Appeals and that it does not tender extraneous or latent issues to this Court for the purposes of obtaining review.

For the foregoing reasons, as well as the reasons stated in the petition for the writ of certiorari, petitioners pray that the writ of certiorari issue on their petition.

Respectfully submitted,

CARL HOPPE,

Attorney for Petitioners.

WILLIAM J. MARSHALL, JR.,

Of Counsel for Petitioners.